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Constitutional Transformation and Its Implications for Japanese Pacifist Democracy

David McArthur

I. Introduction

One of the characteristic provisions of the modern Constitution of Japan is its strict “Pacifist Clause” in Article 9, which explicitly rejects the nation’s sovereign right to engage in warfare and prohibits the maintenance of military forces.¹ Contrary to the high-minded pacifist restrictions of Article 9 is the existence of the Japan Self-Defense Forces (“JSDF”), funded by the fifth largest military budget in the world.² While the JSDF has been controversial since its inception in 1954, the

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1. Christopher W. Hughes, *Why Japan Could Revise Its Constitution and What It Would Mean for Japanese Security Policy*, 50 *ORBIS* 725, 725 (2006); *KENPŌ* [Constitution] art. 9 (Japan).
2. Stockholm International Peace Research Institute, *The fifteen major spender countries in 2006*, http://www.sipri.org/contents/milap/milex/mex_major_spenders.pdf/download (last visited Jan. 28, 2008).

recent deployment of JSDF units in roles supporting the United States' military campaigns overseas has intensified questions from observers in Japan as well as abroad regarding the constitutionality of Japan's well-equipped and internationally deployed military forces.³

This paper will analyze the legality of Japan's modern military capability and the appropriateness of the Japanese government's recent attempts to increase the scope of its military power beyond the pacifist restrictions of Article 9 via the process of constitutional transformation. My argument is two-fold: (1) that a policy of constitutional transformation will upset the balance of power within Japan's government and tarnish Japan's legitimacy as a constitutional democracy; and (2) the expansion of Japan's military operations outside of its borders facilitated by a policy of constitutional transformation will further deteriorate Japan's already tenuous relations with neighboring states.

II. History of Article 9

On August 15, 1945, six days following the atomic bombing of Nagasaki, Japan surrendered unconditionally to the United States of America and World War II officially came to an end.⁴ The Allied Forces subsequently occupied Japan, and the entire territory was governed by military administration directed by the Supreme Commander of the Allied Powers, General Douglas MacArthur.⁵ One of the most important tasks before the American occupiers of Japan following the overthrow of Japan's wartime military regime was the drafting of a new constitution to replace the outdated Meiji Constitution.⁶ Under General MacArthur's command, American military lawyers drafted a new, liberal constitution designed to allow for an effective democratic government to rule post-

3. CHIYUKI AOI, ASSERTING CIVILIAN POWER OR RISKING IRRELEVANCE? JAPAN'S POST-COLD WAR POLICY CONCERNING THE USE OF FORCE, IN *GLOBAL GOVERNANCE: GERMANY AND JAPAN IN THE INTERNATIONAL SYSTEM* 113 (Saori N. Katada et al. eds., 2004); Norimitsu Onishi, *A Region Inflamed: Japan Commits Itself to Sending Up to 600 Ground Troops to Iraq*, N.Y. TIMES, Dec. 10, 2003, at A16, available at <http://query.nytimes.com/gst/fullpage.html?res=9E06E1DE1F3DF933A25751C1A9659C8B63>; Kiroku Hanai, *Ways to Steer Public Opinion*, THE JAPAN TIMES ONLINE, June 25, 2007, <http://search.japantimes.co.jp/cgi-bin/eo20070625kh.html>.
4. Instrument of Surrender, U.S.-Japan, Sept. 2, 1945, 3 Bevens 1251; Henry L. Stimson, *The Decision to Use the Atomic Bomb*, HARPER'S MAGAZINE, Feb. 1947, at 1, available at <http://www.aasianst.org/EAA/StimsonHarpers.pdf>.
5. *Id.* at 7.
6. *Id.* at 9.

war Japan.⁷ Following some amendments by Japan's bicameral legislature, the National Diet, the new Constitution of Japan was approved on October 6, 1946.⁸ Article 9 of the Constitution reads:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.⁹

While other countries have language in their constitutions disavowing war as a tool of international relations, Japan's constitution alone completely forbids the maintenance of a military.¹⁰ While it may seem strange for a sovereign nation to deny itself the right to maintain a military and thus the ability to effectively defend its own borders from foreign attack, this strict pacifistic language was included in Article 9 to be an absolute safeguard to prevent Japan from ever again succumbing to undemocratic military rule or perpetrating imperialistic aggression against its neighbors as it had prior to and during World War II.¹¹ The drafters of the new Constitution of Japan believed that reserving the state's right to maintain a military, even if explicitly for self-defense alone, would create a legal and practical loophole in which otherwise ostensibly offensive military action could be justified.¹² Indeed, Japan had used the right of national self-defense as a justification for its pre-war imperial military expansion.¹³

The drafters of Article 9 instead intended for Japan to rely on cooperation with the international community and its allies to provide for the defense of its territory in the future.¹⁴ This concept most importantly manifested in the form of Japan's security treaty with the United States, which resulted in a network of American military bases throughout Japanese territory.¹⁵

7. MERYLL DEAN, *JAPANESE LEGAL SYSTEM* 465 (2d ed. 2002).

8. Birth of the Constitution of Japan, National Diet Library (2003-2004), <http://www.ndl.go.jp/constitution/e/shiryo/04/131shoshi.html>.

9. KENPŌ art. 9 (Japan).

10. Hughes, *supra* note 1, at 727.

11. Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 *CARDOZO J. INT'L & COMP. L.* 127, 142-145 (2005).

12. *Id.* at 143.

13. AOI, *supra* note 3, at 113.

14. Port, *supra* note 11, at 144.

15. See Security Treaty Between the United States and Japan, U.S.-Japan, Sept. 8, 1951, 3

III. Formation of the JSDF

The JSDF has its origins in the National Police Reserve, an internal security force of 75,000 men initially authorized by General MacArthur to ensure internal stability in Japan following the transfer of most of the occupying American military force to the Korean peninsula in 1950 to engage in the Korean War.¹⁶ Before the Self-Defense Forces Law was enacted, which would allow for the creation of the JSDF, the Japanese Diet fiercely debated whether the JSDF was constitutional under Article 9 and whether the JSDF could legally serve overseas.¹⁷ The Diet finally passed the Self-Defense Forces Law with the stipulation that the JSDF would not be deployed overseas even in furtherance of collective self-defense required by the Mutual Defense Assistance Agreement Between Japan and the United States of America.¹⁸ This principle was affirmed by a unanimous Upper House resolution in 1954 and then by the government's official interpretation of the Self Defense Forces Law issued in 1956, which stated that the JSDF would only be used for strict self-defense in case of foreign attack against Japanese territory and *not* for collective self defense when Japan was not directly under attack.¹⁹

IV. Judicial Challenges Brought Under Article 9

Following the JSDF's creation, the constitutionality of its existence and Japan's right to self-defense under Article 9 has been challenged in the courts of Japan.²⁰ The Constitution of Japan explicitly grants the Supreme Court the power of constitutional judicial review over legislative actions.²¹ The first Supreme Court case to review a challenge brought under Article 9 was *Sakata v. Japan* (known as the Sunakawa case) in 1959.²² In the Sunakawa case, the appellants were defendants to criminal charges for trespassing on an American military base in Sunakawa, a town outside of Tokyo.²³ The appellants argued in their defense that

U.S.T. 3329; GLENN D. HOOK ET AL., *JAPAN'S INTERNATIONAL RELATIONS: POLITICS, ECONOMICS AND SECURITY* 33 (2d ed. 2005).

16. Port, *supra* note 11, at 141.

17. Self Defense Forces Law, Law No. 165 of 1954; AOI, *supra* note 3, at 113.

18. *Id.*

19. *Id.*

20. Port, *supra* note 11, at 145.

21. KENPŌ art. 81 (Japan).

22. *Sakata v. Japan*, 13 KEISHŪ 3225 (Sup. Ct., Dec. 16, 1959).

23. *Id.*

the presence of the American military base on Japanese soil constituted a violation of Article 9 of the Constitution of Japan.²⁴ While the trial court agreed with their argument, the Supreme Court did not and reversed the trial court's decision.²⁵ The Supreme Court held that because Japan's national security relationship with the United States was a highly political issue, it was best left for the legislature and cabinet to decide.²⁶ The Court stated it would only intervene on constitutional grounds if the legislature acted in an "obviously unconstitutional" manner.²⁷

The Supreme Court considered the constitutionality of the JSDF under Article 9 when it reviewed *Uno et al. v. Minister of Agriculture and Forestry* (known as the Naganuma case) in 1982.²⁸ While the Court had previously affirmed Japan's right to self-defense under Article 9, the Naganuma case was the first time the constitutionality of the 1954 Self-Defense Forces Law establishing the JSDF was before the Supreme Court of Japan.²⁹ The plaintiffs, residents of Naganuma, a small town in Hokkaido prefecture, brought their action against the Japanese government when it attempted to convert a section of national forest preserve into a Nike missile site.³⁰ The plaintiffs alleged that the construction violated Article 9, in addition to contributing to soil erosion and destroying flood control provided by the forest.³¹ While the plaintiffs prevailed before the Sapporo District Court, which proclaimed the JSDF unconstitutional under Article 9, the Sapporo High Court reversed on appeal, and the Supreme Court of Japan affirmed the Naganuma decision.³² The Supreme Court held that, because the JSDF had since taken special measures to prevent erosion and flooding resulting from the construction, the plaintiffs were not directly harmed by the actions of the Minister or the JSDF and thus lacked standing to bring the case on purely constitutional grounds.³³ The

24. *Id.*

25. *Id.*

26. *Id.*

27. Craig Martin, *The Case Against "Revising Interpretations" of the Japanese Constitution*, JAPAN FOCUS, May 29, 2007, at para. 21, <http://japanfocus.org/products/details/2434>.

28. *Uno et al. v. Minister of Agric. and Forestry*, 36 MINSHŪ 1679 (Sup. Ct., Sept. 9, 1982).

29. *See Sakata v. Japan*, 13 KEISHŪ 3225 (holding that Article 9 does not prohibit Japan from being able to take the measures necessary for self-defense in order to maintain its peace and security relating to the Japan-United States Security Treaty); Robert L. Seymour, *Japan's Self-Defense: The Naganuma Case and Its Implications*, 47 PAC. AFF. 421, 422 (1974).

30. *Id.* at 426.

31. *Id.*

32. Port, *supra* note 11, at 146.

33. Martin, *supra* note 27, at para. 22.

Supreme Court's ruling on the Naganuma case effectively narrowed the standing required to bring claims under Article 9 against the government to be all but impossible.³⁴

V. Constitutional Transformation

As the Supreme Court failed to determine definitively the constitutionality of the JSDF in the Naganuma case, the JSDF continued to operate undeterred.³⁵ In 1992, the National Diet passed the International Peace Cooperation Law, allowing the JSDF to operate abroad in United Nations peacekeeping operations under limited conditions.³⁶ At the request of the United States, Prime Minister Junichiro Koizumi deployed the JSDF in a logistical capacity to assist the reconstruction of Iraq in 2004.³⁷ This represented the first deployment of Japanese troops abroad without the authority of the United Nations since World War II and has proved to be extremely controversial because of its apparent conflict with Article 9 and prior understandings of the restrictions placed upon the JSDF.³⁸

Under pressure from the United States government to support its military campaigns in Afghanistan and Iraq, the politically dominant Liberal Democratic Party of Japan has pushed in recent years to amend Article 9.³⁹ The proposed amendment would retain the section denouncing war as a means of resolving international disputes, but would change the section prohibiting the maintenance of military forces to allow for a self-defense force that could be deployed abroad in support of international operations.⁴⁰ However, the amendment process provided for by the Constitution of Japan makes it very difficult for a new amendment to be

34. *Id.*

35. Seymour, *supra* note 29, at 434.

36. *Japan's Contribution to UN Peacekeeping Operations*, THE MINISTRY OF FOREIGN AFFAIRS OF JAPAN, at para. 1, <http://www.mofa.go.jp/policy/un/pko/pamph2005.html> (last visited Jan. 28, 2008).

37. Hanai, *supra* note 3.

38. *Id.*

39. Joshua Kurlantzick, *Axis of Good: The Case for Remilitarizing Japan*, WASH. MONTHLY, July-Aug., 2002, at 4, available at http://findarticles.com/p/articles/mi_m1316/is_2002_July-August/ai_90114011; Annie Schleicher, *New Japanese Leader Looks to Expand Nation's Military*, NEWSHOUR EXTRA, Sept. 20, 2006, http://www-tc.pbs.org/newshour/extra/features/july-dec06/japan_9-20.pdf.

43. Holly Manges Jones, *Japan May Revise Military Clause In Constitution*, JURIST, Oct. 6, 2005, <http://jurist.law.pitt.edu/paperchase/2005/10/japan-may-revise-military-clause-in.php>.

passed.⁴¹ Article 96 requires a two-thirds supermajority of each house of the Diet and a majority from a popular referendum for any change to be made.⁴² No amendment to the Japanese Constitution has passed since 1947, when the new constitution took effect and superseded the previous constitution.⁴³

Because of the inherent difficulty of passing a constitutional amendment, Prime Minister Shinzo Abe looked for another solution to the apparent contradiction between Article 9 and the activities of the JSDF abroad. In April of 2007, Abe announced that the government was planning to establish a panel of experts to explore the option of revising the current official interpretation of Article 9.⁴⁴ This revision, coupled with the Supreme Court of Japan's reluctance to interfere with the political process and the decisions of the legislature, would create a situation of *de facto* constitutional transformation that would allow for the continued operation of the JSDF in its activities abroad without changing the wording of Article 9.⁴⁵

While Prime Minister Abe has since resigned following his party's defeat in the House of Councillors election on July 29th, 2007, it remains to be seen whether his successor, Yasuo Fukuda, will pursue a policy of constitutional transformation as a means to resolve the Article 9 question.⁴⁶

VI. Analysis

A. Constitutional Transformation Will Upset the Balance of Power Within the Japanese Government

If the Japanese government implements a policy of constitutional transformation concerning Article 9 it will greatly erode, if not extinguish, the power of the Supreme Court of Japan to review the actions of the legislative and executive branches on constitutional grounds. While the Supreme Court rarely

41. AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 222 (1999).

42. KENPŌ art. 96 (Japan).

43. LIJPHART, *supra* note 41, at 223.

47. Martin, *supra* note 27, at para. 1.

45. *Id.* at para. 2.

46. Hiroko Nakata, *Abe Announces He Will Resign*, THE JAPAN TIMES ONLINE, Sept. 13, 2007, <http://search.japantimes.co.jp/cgi-bin/nn20070912x1.html>; Masami Ito, *Fukuda Elected Prime Minister in Diet Faceoff*, THE JAPAN TIMES ONLINE, Sept. 26, 2007, <http://search.japantimes.co.jp/cgi-bin/nn20070926a1.html>.

exercises the power of judicial review, it has done so in the past.⁴⁷ If the Japanese cabinet begins to offer its own interpretations of the Constitution, specifically ones that plainly contradict the language of Article 9, it will force the Supreme Court to either contradict these claims and lead to a potential constitutional crisis, or tacitly accept the supremacy of the legislative and executive arms of the government in matters of constitutional interpretation.⁴⁸ In light of the Court's own narrowly tailored standard for reviewing claims brought under Article 9 established in the Naganuma case, *supra*, it is unlikely that the Supreme Court would face the government directly over this issue. The Supreme Court's strong deference towards the decisions of the government concerning national security would lead to a situation where the ruling party in the legislature is free to offer its own interpretations of the constitution, thus destroying the vital balance-of-power aspect judicial review brings to a democracy.

B. Constitutional Transformation Will Harm Japan's International Relations

A policy of constitutional transformation concerning Article 9 will significantly damage Japan's relations with its neighbors, namely China, North Korea and South Korea. In light of China's growing economic and political influence in the region and North Korea's recent emergence as a nuclear-armed power, the unsettled question of Japan's legal ability to project military force across national boundaries represents another unwelcome destabilizing factor within the international politics of East Asia.⁴⁹

The end of strict Japanese pacifism brought on by *de facto* constitutional transformation would have severe repercussions for Japan's relations with its neighbors.⁵⁰ The peoples and political leaders of those countries have not forgotten Japan's actions of brutal imperialism during World War II, and they

47. See, e.g., *Koshiyama v. Chairman, Tokyo Metro. Election Supervision Comm'n*, 18 MINSHŪ 270 (Sup. Ct., Feb. 5, 1964) (ruling that a 5:1 discrepancy in the voter-to-representative ratio between two districts was an unconstitutional violation of the right to an equal vote).

48. Martin, *supra* note 27, at para. 34.

49. Bruce Kennedy, *Regional "Godfather" or Local Bully?*, CNN INTERACTIVE (2001), <http://www.cnn.com/SPECIALS/1999/china.50/asian.superpower/neighbors/>; Larry A. Niksch, *North Korea's Nuclear Program, Congressional Research Service Issue Brief for Congress* 9-10 (2005), <http://www.nuclearfiles.org/menu/key-issues/nuclear-weapons/issues/proliferation/north-korea/46412.pdf>.

50. Martin, *supra* note 27, at para. 35.

remain suspicious and antipathetic towards Japan to this day.⁵¹ Article 9 is vital to maintaining normal relations with Japan's neighbors by strongly affirming Japan's commitment to international peace and cooperation. Once Article 9's viability is questioned (as it would be if it were to be subjected to constitutional transformation), the resulting uncertainty has the strong potential to create further ill-will towards Japan in the region.

IV. Conclusion

While *de facto* transformation of Article 9 represents a significant threat to the rule of law in Japan and to Japan's relations with its neighbors, the situation is not entirely grim. The Liberal Democratic Party is in a tenuous position in Japan after having lost control of the upper house of the National Diet in the summer of 2007.⁵² While the Liberal Democratic Party has used its remaining control of the lower house to reaffirm the remaining overseas mission of the JSDF, Fukuda has not expressed any desire recently to aggressively pursue the amendment of Article 9.⁵³ However, with the lack of a clear Supreme Court decision on the issue of Article 9 and the extent to which it allows for Japan's right to participate in collective self-defense, it is possible that the threat of constitutional transformation will appear once more.

Part of the solution must come in the form of support from the United States for Japan as a pacifist nation, rather than the United States' past policy of pushing Japan toward constitutional crisis by encouraging Japan's logistical support of American military campaigns. The United States should emphasize the mutual defense provided for by the U.S.-Japan Security Treaty to assuage Japanese fears of North Korean or Chinese hostility.⁵⁴ Most importantly it is the will of the Japanese people and their strong support for Article 9 and the concept of constitutional pacifism that will be the protector of this crucial aspect of modern Japanese democracy.⁵⁵

51. Carin Zissis, *Japan's New Leader Faces Old Problems with China and South Korea*, COUNCIL ON FOREIGN RELATIONS, Oct. 16, 2006, <http://www.cfr.org/publication/11738/>.
52. *The "Caretaker"*, THE ECONOMIST, Jan. 17, 2008, available at http://www.economist.com/world/asia/displaystory.cfm?story_id=10534302.
53. *Id.*
54. See Treaty of Mutual Cooperation and Security between the United States and Japan, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1632.
55. *Constitution Survey Shows 77% Oppose Changing Article 9*, THE JAPAN TIMES ONLINE, May 4, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20060504a6.html>.

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